86-550

Supreme Court, U.S.
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No

In the Supreme Court of the United States

October Term, 1986

THOMAS G. BECKHAM,

Petitioner

vs.

THE SUN NEWS AND THE SUN PUBLISHING COMPANY,

Respondents.

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September 26, 1986

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QUESTION PRESENTED

Does the media defendant respondent in this libel case have the constitutional right to affirmatively plead and prove truth, even though the burden of proving falsity is on the plaintiff.

PARTIES

The parties to this proceeding are petitioner, Thomas G. Beckham, and The Sun News and Sun Publishing Company, respondents. The named Respondents are actually one corporation. [App J at 43a]

Table of Contents

	Page
Question Presented.....	i
Parties.....	ii
Table of Contents.....	iii
Table of Authorities.....	v
Opinion Below.....	2
Jurisdiction.....	2
Constitutional Provision, Statute, Act and Rule Involved...	3
Statement of the Case.....	3
Reasons for Granting the Writ.....	9
Conclusion.....	16
Appendix A Reversed and Remanded.....	1a
Appendix B Letter from Clyde N. Davis, Jr. denying Petition for Rehearing...	8a
Appendix C Order of the Supreme Court Extending the Time to File Petition for Writ of Certiorari..	9a
Appendix D Complaint.....	10a

Page

Appendix E
Answer..... 18a

Appendix F
Excerpts of Trial Record -
Judge's Charge to Jury..... 24a

Appendix G
Excerpts of Trial Record -
Respondent's Exceptions to
Charge..... 29a

Appendix H
Motion For Judgment NOV..... 41a

Appendix I
Excerpts from Motion For New
Trial..... 45a

Appendix J
Excerpts From Statement of
Appeal..... 48a

Appendix K
Excerpts from Brief of
Appellant..... 51a

Appendix L
Excerpts from Petitioner's
Brief of Respondent to the
South Carolina Supreme Court..... 52a

TABLE OF AUTHORITIES

Cases:	Page
Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975).....	11, 12
New York Times v. Sullivan, 376 U.S. 254 (1964).....	11
Philadelphia Newspapers Inc. v. Hepps, ___ U.S. ___, 106 S. Ct. 1558, 89 LEd. 2d 783 (1986).....	10
Roberts v. Virginia Chemical Company, 84 S.C. 283, 66 S.E. 298 (1909).....	13
CONSTITUTION	
United States Constitution Amendment I.....	1, 13, 14

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THOMAS G. BECKHAM, Petitioner

vs.

THE SUN NEWS AND THE SUN PUBLISHING COMPANY, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA SUPREME COURT

Petitioner Thomas G. Beckham respectfully prays that a writ of certiorari issue to review the judgment and opinion of the South Carolina Supreme Court entered into this proceeding on May 5, 1986.

OPINION BELOW

The decision of the South Carolina Supreme Court is reported at 344 S.E. 2d 603 (S.C. 1986) and is set out at pages 1a - 7a of Appendix A to this petition.

JURISDICTION

The judgment of the South Carolina Supreme Court was entered on May 5, 1986. Petitioner's petition for rehearing was denied on June 3, 1986. (App. B at 8a). Petitioner's application for an extension of time to file this petition was granted until October 1, 1986. (App C. at 9a). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) (1982).

CONSTITUTIONAL PROVISION, STATUTE, ACT, AND RULE INVOLVED

First Amendment, United States Constitution which provides:

> Congress shall make no law ...; or abridging the freedom of speech, or of the press;....

STATEMENT OF THE CASE

Petitioner commenced this libel action against The Sun News and The Sun Publishing Company on February 24, 1983, alleging that articles published in the The Sun News on March 1 and March 3, 1981, contained falsehoods in reporting that he presented false testimony at a preliminary hearing. [App. D; App. L at 52a]. As the named respondents are actually one corporation, they will be referred to herein as the Respondent.

The Respondent answered,

admitting publication of the two articles and denied that they were false, malicious or defamatory or that Petitioner had been caused any injury or damage by reason of the publications. Respondent further raised constitutional privileges and common law privileges and alleged that the articles were substantially true. [App. E; App. J at 48a and 49a; App. G at 29a, 30a].

The trial of the case was held before the Court of Common Pleas for Horry County, South Carolina, beginning on February 6, 1984. [App. J at 49a]. The facts of the case are contained in App. L which is the Petitioner's Statement of Facts submitted in its Brief to the South Carolina Supreme Court (with supporting citations to the trial transcript). The pertinent facts to this Appeal are as follows.

Thomas Beckham, the Petitioner herein, was an undercover police officer with the Horry County Police Department. He and his supervisor, Mike Foreman, participated in a stake-out at a location where marijuana was believed to be stored. In order to obtain the arrest warrants, the Petitioner executed Affidavits detailing facts which supported the issuance of the arrest warrants. [App. L at 57a-61a]. At a subsequent preliminary hearing, Foreman gave false testimony but Beckham refused to testify. Beckham immediately advised his supervisors of Foreman's false testimony and of the apparent falsehoods in the Affidavits. [App. L at 61a]. Both men were fired from the Police Department. The solicitor and police chief held a news conference and issued a press release stating Foreman had given

false testimony at the preliminary hearing. The news release stated Petitioner was an "active participant" in the furnishing of false information. [App. A at 2a, 3a].

The Affidavits signed by Beckham were not false. [App. L at 57a]. At the internal investigation, Petitioner did say that the Affidavits were false. [App. L at 61a],

The Respondent, on March 1, 1981, in a front page article stated that the Petitioner had given false testimony at the preliminary hearing. [App. A at 3a; App. J at 48a; App. L at 64a]. The Petitioner had not testified at the preliminary hearing. [App. L at 60a].

Immediately after the publication, Petitioner contacted the Respondent newspaper on several occasions and informed the Respondent of the false

news articles. [App. L at 64a, 65a]. Nonetheless, on March 3, 1981, the Respondent ran another front page article stating that Petitioner had given untrue testimony at the preliminary hearing. [App. L at 64a and 65a].

The Respondent has never seriously contended that its articles concerning the Petitioner testifying at the preliminary hearing was anything but false. [App. L at 52a]. The Respondent, however, alleged that the Affidavits given approximately one month previously by the Petitioner to obtain arrest warrants were false. The Respondent further alleged, at trial, that the Affidavits comprised the "testimony" that its articles were referring to. [App. I].

The trial court instructed the jury that the Petitioner had the burden

of proving falsity. [App. A at 7a]. The trial court instructed the jury that truth is an absolute defense. [App. F]. The trial court also instructed that the burden to prove substantial truth was on the Respondent

> ... by a fair preponderance of the credible evidence that at the time the statement or publication was made, it was true. [App. F at 24a].

Counsel for Respondent excepted to this charge, although it had been pled as an affirmative defense in the answer. [App. G at 29a, 30a]. The jury returned a verdict on February 8, 1984, awarding Petitioner actual damages in the amount of $1,000,000.00 and punitive damages in the amount of $2,500,000.00. Motions by Respondent for Judgment NOV and for New Trial or New Trial Nisi were heard by the

trial court on February 17, 1984. All motions were denied with the exception of Nisi Remittitur, which was granted as to punitive damages and judgment was entered for the Petitioner in the amount of $1,000,000.00 actual and $1,000,000.00 punitive damages. [App. J at 49A, 50A]. The appeal to the South Carolina Supreme Court was thereafter duly effected. [App. K; App. J at 50a]. The South Carolina Supreme Court reversed and remanded the case ruling that the trial court's charge on the Respondent having the burden of proof as to its defensive substantial truth was erroneous. [App. A].

REASONS FOR GRANTING THE WRIT

The sole and novel issue raised in this petition is whether the trial court erred in charging the jury that the Respondent had the burden of proving its

defense of substantial truth. The trial court properly instructed the jury that the Petitioner, as a public official, had the burden of proving falsity. [App. A at 7a].[1]

Although the Respondent reported on two separate occasions that the Petitioner had given false testimony at a preliminary hearing, it is undisputed that the Petitioner never took the witness stand. The Respondent pled, in essence, substantial truth as an affirmative defense. The Respondent did not object to the judge charging the jury that it had pled the affirmative defense of truth, but only objected to the charge

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[1] In Philadelphia Newspapers, Inc. v. Hepps, _____ U.S.____, 106 S.Ct.1558, 89 L.Ed 783 (1986), the United States Supreme Court held that falsity cannot be presumed in libel actions against media defendants. No such presumption was charged in this case.

that it carried the burden of proof as to establishing substantial truth as a defense. [App. G at 29a, 30a].

Truth is a constitutional defense. In Cox Broadcasting Corporation v. Cohn, 420 U.S. 469 (1975), the United States Supreme Court stated

> It is true that in defamation actions, where the protected interest is personal reputation, the prevailing view is that truth is a defense; and the message of New York Times Co. v. Sullivan [and its progeny] ... is that the defense of truth is constitutionally required where the subject of the publication is a public official or public figure. 420 U.S. at 489-490 (Citations and Footnote omitted)

Clearly no limitation can be imposed on a media defendant asserting truth in a

libel case. The media defendant certainly has the constitutional right to assert substantial truth as an affirmative defense. Cox Broadcasting Corporation v. Cohn, supra.

In this case, the Respondent does not seriously contend that the Petitioner did not take the witness stand at the preliminary hearing. Rather, the Respondent argues that its newspaper accounts were "substantially true" in that the arrest warrant Affidavit signed by the Petitioner approximately one month prior to the preliminary hearing constituted "testimony" at the preliminary hearing. The Respondent attempted to prove this by use of a two-step argument. First, it attempted to show that the original arrest warrant affidavits contained false statements. Secondly, the Respondent attempted to

prove that these alleged false statements in the affidavits were part of the testimony at the preliminary hearing.

The Respondent's position is that if it were able to establish both steps outlined above, then it would have proven its defense of "substantial truth".

The Respondents voluntarily chose to plead truth as an affirmative defense. In South Carolina, the party who pleads an affirmative defense cannot complain when the judge instructs the jury that the party so asserting it has the burden of proving the affirmative defense. Roberts v. Virginia-Carolina Chemical Co., 84 S.C. 283, 66 S.E. 298 (1909).

South Carolina law is not inconsistent with the protections afforded under the First Amendment.

In this case the Respondent did not rely on the clear wording of its

newspapers articles, nor could it. The Petitioner did not take the witness stand at the preliminary hearing. Instead, the Respondent sought to avoid liability by proving "substantial truth." In order to do so, the Respondent had to rely on affidavits to arrest warrants which it then had to prove false. The Respondent also had to show that these affidavits were part of the testimony of the preliminary hearing.

The Respondent chose to bring into issue the affidavits as its basis for substantial truth. In a case where the Respondents defense rest on facts which are so tenuous and the Respondent voluntarily pleads it affirmatively, then in such a case, it does not violate the protections of the First Amendment to place some of the burden of proving such a defense on the Respondent.

As a matter of constitutional principle, jury confusion does not result. The Petitioner had the burden of proving falsity which he did by showing that he did not testify. The Respondent, by placing the prior affidavits into issue exercised its constitutional right to prove substantial truth. As a defense the Respondent chose to bear the burden of proof by affirmatively pleading truth. The Respondent's constitutional First Amendment safeguards were protected in this case rather than violated.

Lastly, the potential conflict lies in the unclear boundary between the plaintiffs burden and the media defendant's right to plead affirmative defenses. Confusion will arise whenever a defense is affirmatively pled and the media defendant is put to prove its obligation to prove its affirmative

defense. Without clarification, from the United States Supreme Court, this problem will continue to plague both plaintiffs and media defendants.

CONCLUSION

For the above reasons a writ of certiorari should issue to review the judgment and opinion of the South Carolina Supreme Court.

Respectfully submitted,

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September 26, 1986

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APPENDIX

APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Thomas G. Beckham,.....Respondent,

v.

The Sun News and The Sun Publishing Company,.....Appellants.

Appeal From Horry County
Ralph King Anderson, Jr., Judge

Opinion No. 22542
Heard March 24, 1986 - Filed May 5, 1986

REVERSED AND REMANDED

John B. McCutcheon, of McCutcheon, McCutcheon & Baxter, of Conway; William L. Pope and Patricia B. Kinard, both of Robinson, McFadden, Moore, Pope, Williams, Taylor & Brailsford, of Columbia, for Appellants.

John M. Leiter, Ronald K. Lawn, both of Lawn and Leiter, of Myrtle Beach; Carroll D. Padgett, Jr., of Loris; Kenneth A. Richstad and Ronald M. Childress, both of Childress & Richstad, of Columbia, for Respondent.

==========

NESS, C. J.: The Sun News appeals a jury verdict against it in a

libel action brought by respondent Beckham. We reverse.

Beckham was an undercover police officer with the Horry County Police Department. He and his supervisor Mike Foreman participated in a stake-out at a location where marijuana was believed to be stored. In order to obtain a search warrant, both men executed affidavits detailing facts which Beckham later said were false. At a subsequent preliminary hearing, Foreman gave false testimony, but Beckham refused to testify. Beckham immediately advised his superiors of Foreman's false testimony and of the apparent falsehoods in the affidavits. Both men were fired from the police department. The solicitor and police chief held a news conference and issued a press release stating Foreman had given false testimony at the preliminary

hearing. The news release stated Beckham was an "active participant" in the furnishing of false information.

The Sun News published an article which stated that Beckham and Foreman had testified falsely at the preliminary hearing. Beckham brought this action for libel, and a jury awarded him $1 million actual damages and $2.5 million punitive damages. Upon motion of the Sun News, the trial judge reduced the punitive damage award to $1 million. This appeal followed.

The Sun News asserts the trial judge erred in charging the jury that truth is a defense as to which the defendant in a libel action has the burden of proof. It argues that in cases involving public officials and public figures, the plaintiff must prove falsity as an element of his case, and there is

no burden on the defendant to prove truth.

We have held that a defamatory statement is presumed to be false. Pierce v. Inter-Ocean Casualty Company, 148 S. C. 8, 145 S.E. 541 (1926). Indeed, we have found reversible error where the jury was instructed the plaintiff had the burden of proving falsity. Herring v. Lawrence Warehouse Company, 222 S. C. 226, 72 S.E.2d 453 (1952). Truth has been an affirmative defense as to which the defendant has the burden of pleading and proof. Ross v. Columbia Newspapers, Inc., 266 S. C. 75, 221 S.E.2d 770 (1976).

However, in libel actions brought by public officials and public figures the traditional burdens of proof are necessarily altered by the constitutional protections afforded the press. When a

libel action is brought by a public official or public figure, the constitutional guarantees of freedom of speech and press require the plaintiff to establish the defamatory falsehood was made with actual malice, i.e., with knowledge of falsity or reckless disregard of whether it was false or not. Scott v. McCain, 272 S. C. 198, 250 S.E.2d 118 (1978). We have not before been called upon to determine whether this heightened burden of proof in cases involving public officials and public figures requires an affirmative showing by the plaintiff that the defamatory statement was false. We hold that it does.

The United States Supreme Court has held that a defamed public official or public figure must prove the falsity of the allegedly libelous publication.

Cox Broadcasting Corporation v. Cohn, 420 U. S. 469 (1975).[1] This requirement follows necessarily from the actual malice standard. Before knowing falsity or reckless disregard for truth can be established, the plaintiff must establish the statement was, in fact, false. Bee Publications, Inc. v. Cheektowaga Times, Inc., 107 A. D. 2d 382, 485 N.Y.S. 2d 885 (4th Dept. 1985). See also, News Publishing Company v. DeBerry, 171 Ga. App. 787, 321 S.E.2d 112 (1984). Since the public official or public figure plaintiff has the burden of proving

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[1]Pending filing of our opinion in this case, the United States Supreme Court issued its opinion in Philadelphia Newspapers, Inc. v. Hepps, No. 84-1491 (U.S. Apr. 21, 1986), a libel case involving a private plaintiff. While distinguishable, its reasoning is also applicable to libel actions brought by public officials or public figures. It is therefore cited as additional authority for our decision in this case.

falsity, it is error to instruct the jury that the defendant has the burden of establishing truth. Colson v. Stieg, 89 Ill. 2d 205, 433 N.E.2d 246 (1982). See also Nash v. Keene Publishing Corp., 498 A. 2d 348 (N. H. 1985).

In the present case, the trial judge properly charged the jury that the plaintiff had the burden of proving falsity. However, he also charged the jury that truth was a defense as to which the defendant had the burden of proof. We agree with the Sun News that this improper charge was necessarily confusing to the jury. The judgment is reversed and the case is remanded for a new trial.

REVERSED AND REMANDED.

GREGORY, HARWELL, CHANDLER, and FINNEY, JJ., concur.

APPENDIX B

The Supreme Court of South Carolina

June 3, 1986

John M. Leiter, Esquire
Post Office Box 7516
Myrtle Beach, South Carolina 29577

Re: Beckham v. The Sun News, et al.

Dear Mr. Leiter:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition denied.

s/ J. B. Ness C.J.

s/ George T. Gregory, Jr. A.J.

s/ David W. Harwell A.J.

s/ A. Lee Chandler A.J.

s/ Ernest A. Finney, Jr. A.J.

June 3, 1986."

The remittitur is being forwarded to the Clerk of Court for Horry County.

Sincerely yours,

/s Clyde N. Davis, Jr.
CLERK

CND,Jr/krp

APPENDIX C

Supreme Court of the United States

No. A-127

THOMAS G. BECKHAM,

Applicant,

v.

SUN NEWS AND SUN PUBLISHING COMPANY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicant,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case be, and the same is hereby, extended to and including October 1, 1986.

/s/Warren E. Burger
Chief Justice of the United States

Dated this 22nd

day of August, 1986.

APPENDIX D

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

Appeal from the Court of Common Pleas for
Horry County
Honorable Ralph King Anderson, Jr.,
Presiding Judge
Docket No. 83-CP-26-383

Thomas G. Beckham,

Respondent

vs.

The Sun News and The Sun
Publishing Company,

Appellant.

COMPLAINT

THE PLAINTIFF HEREIN, complaining of the Defendants herein would respectfully show unto the Court and allege:

1. That the Plaintiff is a

citizen and resident of the County of Horry, State of South Carolina; that the Defendant, The Sun News is a newspaper published daily in the city of Myrtle Beach, State and County aforesaid with its principal circulation in Horry County, South Carolina and surrounding Counties; that the Defendant, The Sun Publishing Company, is the legal entity which owns the Defendant, The Sun News and all parties are thus within the jurisdiction of this Honorable Court.

2. That at all times material hereto, the Defendant, The Sun Publishing Company, was and is the owner and publisher of a major Newspaper known as The Sun News published in the City of Myrtle Beach, State and County aforesaid, that the Defendant The Sun News was and is a Newspaper published daily in the City of Myrtle Beach, State and County

aforesaid with principal circulation in Horry County and surrounding Counties. That at all times material hereto, the Defendant The Sun Publishing Company owned, operated and published a newspaper under the trade name of The Sun News.

3. That heretofore, on or about March 1, 1981, the Defendant, The Sun News, by and through an article written by Bob Bloodworth, its employee and agent did publish and cause to be circulated in Horry County, South Carolina and surrounding areas certain false, malicious, and defamatory statements about Plaintiff in the following words:

> "Although it was discovered Foreman and Beckham presented false testimony during Thursdays preliminary hearing, only Dunn, Detective Captain Buddy Fowler and Chief Harris were aware of it until Saturday."

A more complete rendition of Defendants defamatory false and malicious statements are incorporated herewith as Exhibit A. That the language and representaiton (sic.) which were issued, circulated, and published by the Defendants was false and known to be false or should have been known to be false by the Defendant and were made uttered and published with reckless disregard of the statements truth or falsity. That the said article and language complained of, were printed, published, and circulated by Defendants with such reckless disregard and carelessness as to its truth or falsity as to indicate an utter disregard of the rights of Plaintiff and the consequences of Defendants actions, thereby maliciously, negligently, and inexcusably exposing Plaintiff to public hatred,

contempt, scorn, and ridicule and impeaching Plaintiffs honesty, integrity, virtue and reputation and with a specific intent to injure Plaintiff in his good name.

4. That thereafter, by various and sundry articles and publications published and caused to be circulated in Horry County South Carolina and surrounding areas, Defendants by innuendo, suggestion, inference and implication accused Plaintiff of perjury and false swearing, said articles being attached hereto as Exhibits B, C, D, E, and F.

5. That the issuance, circulation and publication of the above described language implying and suggesting that Plaintiff was guilty of perjury and had sworn falsely was false and defamatory and was known or should

have been known to be false by the Defendants. That the Defendants failed to take the proper steps to ascertain whether the published matter was true or false, and instead published same with reckless disregard of its truth or falsity.

6. That in publishing the defamatory matter set forth above, Defendants acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties.

7. That Plaintiffs exacerbated the injury and damage to Plaintiff by causing said slanderous, libelous, and false information to be disseminated to other newspapers including but not limited to a publication in the State

Newspaper in Columbia, South Carolina on Sunday March 22, 1981, copy of which is attached hereto as Exhibit G.

8. That the issuance, circulation and publication of the newspaper articles herein referred to containing said language charged and meant to charge and it was so understood by those reading and hearing the same, that Plaintiff was dishonest and of questionable integrity; that said articles relating to the defamatory language alleged are false, malicious, defamatory and libelous and hold Plaintiff up to scorn, contempt, ridicule, hatred, and derision and reflects upon and has injured the Plaintiff in his good name, reputation and character.

9. That because of and as a result of the false charges herein above

stated, the Plaintiff has been injured in his good name, has been derided, held up to public scorn and ridicule, has suffered mental anxiety, embarrassment, and a deterioration of his health all to his damage in the full and just sum of $5,000.000.00 (sic.) actual and punitive damages.

WHEREFORE, Plaintiff prays for judgment against the Defendants in the full and just sum of Five Million ($5,000.000.00) (sic.) Dollars actual and punitive damages, for the cost of this action and for such other and further relief as this Court deems necessary, just, and proper.

APPENDIX E

ANSWER

The defendants, answering the Complaint allege:

FOR A FIRST DEFENSE

1. The defendants deny all allegations of the Complaint not hereinafter specifically admitted.

2. That answering paragraphs 1 and 2 of the Complaint, defendants admit that the plaintiff was a resident of Horry County and that The Sun News is a Myrtle Beach newspaper published in Horry County by The Sun Publishing Company, Inc.

3. That defendants deny that the article of March 1, 1981, complained of by the plaintiff was false, malicious or defamatory and allege that this article was in a series of articles concerning a matter of extreme public

interest and concern to the citizens of Horry County and the articles were published in an endeavor to inform the public concerning police activity in Horry County and was not published with the intent to injure the plaintiff.

4. The defendants deny that they have accused plaintiff of any criminal activity and that the publications complained of were reports of judicial proceedings concerning police activity and were published in the belief that they accurately reflected these proceedings.

5. That defendants deny that the articles complained of were false, malicious, defamatory or libelous or that they were published with intent to charge that plaintiff was dishonest or of questionable integrity.

6. That defendants allege that

the articles complained of by the plaintiff are substantially accurate reports of what transpired in judicial proceedings in which plaintiff was a participant and deny that the plaintiff was injured or sustained any damages by reason of any fault or malice on the part of the defendants.

FOR A SECOND DEFENSE

7. That further answering the Complaint and as a second defense thereto, the defendants allege that the articles complained of were privileged in that they related to matters of public interest about police activities and judicial proceedings and were published without malice.

8. That further answering the Complaint, the defendants allege that the plaintiff, being a detective of the Horry County Police Department was a public

official as defined under the Constitution and laws of the State of South Carolina and of the United States and that the publications were privileged as an exercise of the right of free speech and free press.

FOR A THIRD DEFENSE

9. That further answering the Complaint and as a third defense thereto, the defendants allege that the subject matter of the articles complained of was a matter of public interest and of legitimate concern to the public.

10. That the articles complained of were published in good faith and that the information was contained in the public records of Horry County and was therefore privileged publications under the Constitution and laws of the State of South Carolina and of the United States as an exercise of the right of free

speech and free press.

FOR A FOURTH DEFENSE

11. That further answering the Complaint and as a fourth defense thereto, defendants deny that the article complained of were false, defamatory, malicious, slanderous or libelous.

12. That defendants allege that the articles complained of were published without malice for the purpose of informing the public on matters of extreme public interest and concern.

FOR A FIFTH DEFENSE

13. That further answering the Complaint and as a fifth defense thereto, defendants allege that the subject of the articles complained of was the object of an investigation by law enforcement agencies of the State of South Carolina and the information was already in the public domain, prior to the publications

complained of.

WHEREFORE, having answered the Complaint of the plaintiff, the defendant, The Sun News and The Sun Publishing Company, Inc. pray that the same be dismissed.

APPENDIX F

EXERPTS OF TRIAL RECORD -

JUDGE'S CHARGE TO JURY

You will recall that I said that the burden of proof is upon the Plaintiff to prove the Plaintiff's case. But as you come to the defense of truth, it is an affirmative defense in the law. The burden of proof is upon the Defendants to prove that by the greater weight or preponderance of the evidence.

The Defendants claim that the publications or statements they are charged with publishing are, in fact, true. Truth is a complete defense to an action for libel no matter how injurious the publication or statements. The burden is upon the Defendants to prove by a fair preponderance of the credible evidence that at the time the statement or publications was made, it was true.

To establish a defense of truth, the Defendants must prove that the entire statement or publication was true. It is not sufficient that a part of the statement or publication was true.

This does not mean, however, that every word in every sentence need be proved true. Variances in immaterial particulars may be disregarded. The test is whether the publication or statement, as published, would have a different effect on the mind of the reader or hearer than the truth would have produced. You must determine from the evidence presented what the truth was and compare that with the publication or publications which you find were made by the Defendants; taking that publication or publications according to the ordinary meaning of the language used. If you find that there was no substantial

difference between the publication or publications and the truth, your verdict would be for the Defendants.

If you find that the publication or publications differed in substantial respects from the truth, your finding would be for the Plaintiff on that issue.

I charge you that minor mistakes about details of a person's conduct or misbehavior will not deprive a defendant or defendants of the defense of truth. It is enough that the defamatory statement be substantially true. The article is to be viewed in its entirety.

A statement which is substantially true is non-actionable as a matter of law.

In determining whether or not the alleged libelous statement is substantially accurate, the statement must be read in the context of the entire

article in which it appears. Mistakes in describing legal terms do not make an article false or actionable.

I charge you, the jury, that the truth of the matter published is, of course, a complete defense to a suit based upon alleged defamation. I also charge you that a sufficient defense is made out in behalf of the Defendants where the evidence shows that the statement of the matter published was substantially true.

I charge you that under the law of the State of South Carolina, strict adherence to legal terminology in reporting judicial proceedings is not required on the part of a newspaper. It is enough to satisfy the law that the newspaper article or article conveys to the persons who read it a substantially correct account of the proceedings.

I charge you that if you find that the reporter of the Defendants wrote the articles complained of on the basis of the good faith belief that the Plaintiff's affidavits, on which the arrest warrants were issued, were false and that they constituted testimony on the part of the Plaintiff in the hearing on such warrants, then in such case, you must find the articles substantially accurate as an account of the preliminary hearing; and in such a case, your verdict must be in favor of the Defendants.

APPENDIX G

EXCERPTS OF TRIAL RECORD -

RESPONDENT'S EXCEPTIONS TO CHARGE

BY ATTY. POPE: Your Honor, on behalf of the Defendants, we would take exception to Your Honor's charge on the burden of proof being on the Defendants to prove the truth. I believe under the First Amendment, under the case of Times versus Sullivan and also the cases of this state, that the burden is on the Plaintiff to prove the falsity and the burden doesn't shift to the Defendants to prove truth.

BY THE COURT: What do you say about that, Mr...

BY ATTY. PADGETT: Your Honor, we would certainly take the position that the Plaintiff must prove the actual malice in this particular case, and if the defense raises the issue of truth,

then that is an affirmative defense which they have the burden to prove, not, as I understand it, by clear and convincing evidence, but by the greater weight or preponderance of the evidence---

BY THE COURT: Which I charged.

BY ATTORNEY PADGETT: Yes sir, which is exactly what Your Honor charged.

BY THE COURT; Mr. Pope, do you have a case on that? I don't want to make an egregious error. Obviously, we judges all make all kinds of errors and we admit that from time to time officially on the record. Do you have a case on that point.

BY ATTORNEY POPE: Your Honor, I believe there are some cases that we've-- I don't have one in here with me, but in the brief I think that there is some general law under The New York Times versus Sullivan and those cases that---

BY THE COURT: Well, of course, I charged the actual malice...

BY ATTY. POPE: All right, sir---

BY THE COURT: ---And I made that clear, that they had to prove that by convincing evidence.

BY ATTY. POPE: ---And I think---

BY THE COURT: ---Stated it more than one time.

BY ATTY. POPE: They've got to prove that the publication was false; under that theory, I think when you charged that proof must be proved by the Defendants, that is in contradiction to Your Honor's charges on The New York Times versus Sullivan.

(Pause)

Your Honor--excuse me...

BY THE COURT: I'm pondering and cogitating.

BY ATTY. POPE: Excuse me.

BY THE COURT: Mr. Pope, you make an excellent argument. It sounds mighty good. Now whether it's the law of the state... Of course, we told them what actual malice is, as defined under Sullivan. The precedential authority has always stated that the burden of proof on truth is on the defendant. What about the proposition, counsel, that because of the nature of the burden of proof placed upon a public official that... it may not be a burden of proof there on the defendant, or Defendants in this case?

BY ATTY. PADGETT: Well, Your Honor, if they had not raised the truth, the burden would still be the same whether they had raised it or not, but once they raised it, it is an affirmative defense, as I understand the law in this state, that they have to prove it just by the greater weight or the preponderance,

which is what they would have to do in any case. We have to prove that the statement was false, which we certainly submit that there is substantial testimony to that effect.

BY THE COURT: Mr. Pope, in regard to my charge on truth, of course, we are talking about a lot of principles and nuances in reference to that, such as substantial accuracy and substantially correct and the like, I'm going to stay with it. I hope I have not made an egregious error, but I'm going to stay with it. I respectfully overrule that objection, even though I have some reservations about it. But I must go with what I believe to be right at this stage.

BY ATTY. POPE: I understand, Your Honor.

BY THE COURT: All right.

BY ATTY. POPE: If I, Your Honor, may also point out that actionable per se and libelous per se and the presumptions and the law of damages, I would take the same position, that that is no longer proper instruction under the public official--under The New York Times and Gertz.

BY THE COURT: Well, if he makes out his case, it is libelous per se, isn't it? I mean the fact that he makes it out...

BY ATTY. POPE: But I don't think that under the public official situation now that it is permitted to have a presumption---

BY THE COURT: In regard to that or---

BY ATTY. POPE: ---On proof---

BY THE COURT: ---All right, I note that for the record. I would

respectfully overrule that.

BY ATTY. POPE: Your Honor, may I also just point out a couple of other things that... In discussing punitive damages, you mentioned malicious and wanton conduct, and we would submit that--we would take exception to the fact that the jury was instructed, of course, and they have to... again, actual malice must be shown and it's not just the...

BY THE COURT: Mr. Pope, I've got four notations in my written charge here that I have, and I followed a written charge, I did not wing it, four notations in terms of the definition of Sullivan on actual malice. I know I did it four times. If I didn't, my bifocals were not registering right because I have it four times in this written charge that I had prepared. Now if I charged them clearly that, then I think you have to then take

the charge in its entirety, and the jury, I think, must be given credit for the fact that they can understand that charge, and I would respectfully overrule that.

BY ATTY. POPE: And two other points, Your Honor, one point; when you started off the charge, it was preponderance of evidence and then you later said clear and convincing evidence when you got down to the charges. But I would take exception to the preponderance of evidence. The Plaintiff has more of a burden than the preponderance of evidence, he must prove---

BY THE COURT: All right, I want to talk to you about that because I thought about that last evening, gave that a lot of thought, whether it did any good or not, I don't know. But the burden in all of the cases that I looked

at, and I've got a fair amount of material available to me from other cases and from publications on this particular point. The cases all say that actual malice is involved in a case with a public official, and the burden of proof on actual malice is to prove that by clear and convincing evidence. Now the burden of proof on other issues in the case seems to be by the greater weight or preponderance of the evidence. All of the cases that I looked at, from the standpoint of the ones that you had cited in your brief and the ones that I have available, said every time specifically that actual malice had a clear and convincing burden on it, but did not relate to the other issues in the case. I'd like to hear you on that part.

BY ATTY. POPE: Your Honor, I believe the onus--I think the actual

malice is an issue that pervades the whole proof of the Plaintiff's case---

BY THE COURT: I know, but it's not the sole issue in the case in terms of the other issues; for example, the issue on damages, proving damages and other issues in the case that are relevant that don't relate to that particular segment, that is, actual malice. You have a good point, an excellent point. Of course, on review it will be thoroughly discussed I'm sure. The record will be noted, I overrule that objection. But I certainly understand the reason for that one, Mr. Pope. I just simply have thought about that a lot and I think you raise an excellent point that needs to be reviewed.

BY ATTY. POPE: One other point, Your Honor, is, you know, the publications that were introduced into

evidence there was one on March the 1st, one on March the 3rd and one on March the 4th where it was pointed out that the Plaintiff did not actually testify and I think that could be considered by the jury as far as mitigation is concerned.

BY THE COURT: Well, you didn't plead retraction. I looked at your pleading. You definitely did not plead retraction. I've got a charge on retraction, had it ready, and was thinking about that and reflecting on that, and you did not plead retraction and I believe it is required to be pled in regard to an issue in a charge on that. Do you contend now--maybe I misread the pleading. Do you contend that you actually pled retraction?

BY ATTY. POPE: No sir.

BY THE COURT: All right. I would respectfully overrule that.

BY ATTY. POPE: May I consult with counsel just a minute, Your Honor---

BY THE COURT: Yes sir, yes sir.

(Pause)

BY ATTY. POPE: Thank you, Your Honor.

APPENDIX H

MOTION FOR JUDGMENT NOV

The defendant moves for judgment non obstante veredicto upon the following grounds:

1. Under the evidence the newspaper articles when considered in their entirety were substantially accurate accounts in all material respects of the matters reported therein at the time of publication and therefore the defendant is not liable in damages for the publications complained of by reason of the provisions of the First Amendment to the Constitution of the United States relating to freedom of speech and of the press.

2. The plaintiff failed to show by clear and convincing evidence that the newspaper articles about him as a public official were false and were published by

the defendant with knowledge of such alleged falsity or with a high degree of awareness of their probable falsity, and therefore, the defendant is not liable in damages for its publications under the provisions of the First Amendment to the Constitution of the United States relating to freedom of speech and of the press.

3. Under all the material evidence it appears as a matter of law that plaintiff has failed to prove by clear and convincing evidence that the alleged defamatory articles concerning a public official were actionable under the constitution and laws of the United States and the State of South Carolina relating to freedom of speech and of the press.

4. Under all the material evidence it appears as a matter of law

that the plaintiff is a public official and therefore the articles complained of were privileged under the constitution and laws of the United States and of the State of South Carolina and plaintiff has filed to prove by clear and convincing evidence that the articles were false and were published with actual malice.

5. Under all the evidence that the publication of the articles complained of were privileged and the defendant is not liable therefor under the provisions of the First Amendment to the Constitution of the United States in respect of freedom of speech and of the press because the evidence as a matter of law fails to show that the publications were made by the defendant with actual malice and liability under said Amendment cannot be predicated upon a presumption of malice based upon the content of the

articles published.

6. Under all the material evidence it appears as a matter of law that plaintiff failed to prove by clear and convincing evidence that any damages sustained by him were the proximate result of the articles complained of.

Upon all additional grounds included in its motion for a directed verdict, the defendant respectfully moves for a judgment non obstante veredicto.

APPENDIX I

EXCERPTS FROM MOTION FOR NEW TRIAL

The defendant, subject to its motion for judgment non obstante veredicto, moves for a new trial or in the alternative for a new trial nisi, upon the following grounds:

***

5. The verdict in the plaintiff's favor was against the manifest weight of the evidence, in that the plaintiff did actually falsely swear to the affidavits which were a part of the preliminary hearing, and he was one of those present at the hearing in support of the arrest warrants procured by the plaintiff by means of such affidavits which were presented at the hearing, and there was no basis in the evidence for the jury to find that the newspaper articles were not substantially

accurate.

6. The verdict was against the manifest weight of the evidence because the only reasonable inference from the evidence was that the reporter in good faith believed that the plaintiff's affidavits were false and also that they were presented as testimony in the hearing at which he and the other officer were present in support of the warrants procured thereby, and the only reasonable inference from the evidence is that the newspaper articles complained of were substantially accurate in their content and that they were not published with actual malice as defined under the First Amendment.

7. The Court should set aside the jury's verdict and order a new trial absolute on the ground that the verdict conclusively shows disregard by the jury

of the instructions of the Court, or failure on the part of the jury to heed instructions of the court as to the issues in the case.

8. The verdict was against the manifest weight of the evidence and the law applicable thereto for the reason that false swearing whether oral or in writing constitutes perjury under Section 16-9-30 of the Code of Laws of South Carolina (1976).

9. The Court erred in charging the jury that the burden of proof on the issue of truth shifted to defendant and thereby relieving the plaintiff of the burden of alleging and proving falsity of the articles by clear and convincing evidence as required under the provisions of the First Amendment to the Constitution of the United States.

APPENDIX J

EXCERPT FROM STATEMENT ON APPEAL

STATEMENT

Respondent commenced this libel action against The Sun News and The Sun Publishing Company on February 24, 1983, alleging that articles published in The Sun News on March 1 and March 3, 1981, defamed him in reporting that he presented false testimony at the preliminary hearing. The named defendants are actually one corporation which is referred to herein as the appellant.

The appellant answered, admitting publication of the two articles and denying that they were false, malicious or defamatory or that respondent had been caused any injury or damage by reason of the publications. Appellant further raised constitutional privileges and

common law privileges and alleged that the articles were substantially accurate reports of what transpired in judicial proceedings.

The trial of the case was held before the Court of Common Pleas for Horry County, beginning on February 6, 1984. During the trial the appellant's Motion for a Directed Verdict was denied by the presiding judge. The jury returned a verdict on February 8, 1984, awarding respondent actual damages in the amount of $1,000,000 and punitive damages in the amount of $2,500,000. Motions by appellant for Judgment NOV and for New Trial or New Trial nisi were heard by Judge Anderson on February 17, 1984. All motions were denied with the exception of nisi remittitur, which was granted as to punitive damages. Respondent accepted the remittitur as ordered and judgment

was entered for the respondent in the amount of $1,000,000 actual and $1,000,000 punitive damages. Notice of Intent to Appeal was served by appellant on the attorneys of record for respondent, and filed in the office of the Clerk of the Court of Common Pleas for Horry County and in the Supreme Court on February 23, 1984. Thereafter the appeal was perfected in due time by the filing of the transcript containing case and exceptions.

APPENDIX K

EXCERPTS FROM BRIEF OF APPELLANT

QUESTIONS PRESENTED

I. The news articles complained of were substantially true.

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(Exceptions 1 and 17)

III. In this libel action by a public official the trial judge committed reversible error in charging the jury that truth is an affirmative defense and that the burden of proof on the issue of truth was upon appellant.

(Exception 5)

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APPENDIX L

EXCERPTS FROM PETITIONER'S BRIEF OF RESPONDENT TO THE SOUTH CAROLINA SUPREME COURT

STATEMENT OF FACTS

This libel action rests on falsehoods appearing in front-page articles of the appellant newspaper. Those false articles testimony at a preliminary hearing. (Tr., pp.306-307). Respondent had not testified at the preliminary hearing, however, and Appellant has never seriously contended those reports were anything but false. [See Tr., p. 308, Section 3 (correction)].

Beckham was serving as an Horry County Police officer in early 1981 when the relevant events took place. (Tr. p. 20). He was assigned as an undercover narcotics agent, a position he had held

for two weeks, when a major drug-smuggling operation became known to his supervisor, Mike Foreman. (Tr., pp. 20-23). Information from federal sources pinpointed the location of a vast store of marijuana in Horry County. (Tr., pp. 23-24). Along with this information came the warning that the drugs were guarded by a Cuban armed with an automatic weapon. (Tr., p. 25).

Foreman, Beckham and other officers began to stake out the location -- the Ship's Wheel Seafood House in Little River. (Tr., p. 24). Sometime during the surveillance, all officers except Foreman and Beckham abandoned the vigil. (Tr., p. 26). Foreman and Beckham stayed on, even though an informant advised them that their presence had been betrayed to the smugglers. (Tr., pp. 26-27). Foreman

had earlier received information that police officers were involved in this smuggling operation. (Tr., pp. 23, 27).

As the night wore on into morning, Foreman decided their surveillance indeed had been betrayed. (Tr., p. 27). He left to obtain a search warrant for the stored marijuana. (Tr., p. 27). Beckham maintained the watch alone. (Tr., p. 27). Foreman secured the search warrant. As he was returning to the Ship's Wheel, he saw a certain Jerry High leaving the scene in a van, which passed him at a high rate of speed. (Tr., pp. 28, 29, 69, 72).

They served the warrant on the restaurant (no one being present) and entered a cooler at the rear of the restaurant. (Tr., p. 29). In the cooler they found fifty (50) bales of marijuana, with a total weight of about 5,000

pounds. The value of this seizure was estimated at between two and two and a half million dollars. (Tr., p. 29).

In view of reports that the drugs were guarded by heavily armed Cubans, Foreman decided to call in back-up. (Tr., pp. 29-30). As units arrived from the County Police and other departments, Foreman began elaborating on the information he had actually received. (Tr., p. 30). He stated he had seen trucks in the parking lot, one of which had almost turned over as it left at a high rate of speed. (Tr., p. 30).

When Beckham challenged his superior on these points, Foreman replied that this ruse was necessary to flush out the traitors within the department. (Tr., pp. 30, 33-34). Foreman then, later, and always, assured Beckham that the facts would be straightened out in

short order. (Tr., pp. 31, 46, 81).

Jerry High and three other individuals were arrested in Jerry High's van very shortly afterward about half a mile from the Ship's Wheel. (Tr., pp. 32). A fifth individual, Bobby Gore, was also arrested. Gore had been in the Ship's Wheel on the morning the arrests were made. (Tr., pp. 94-95).

Foreman and Beckham later that same day sat in the office of James O. Dunn, Solicitor for the Fifteenth Judicial Circuit. (Tr., p. 35). Foreman related material to support arrest warrants for the five individuals and for a search of the van seized when Jerry High was arrested. (Tr., p.35). Dunn then dictated the material to be typed. (Tr., p. 35). Before the forms were completed, Foreman left. (Tr., p. 35). Beckham then worked with the Solicitor

and his secretary to revise the information. (Tr., p. 89). Some material was added in the magistrate's office to each affidavit. (Tr., p. 92). The affidavits were then signed by Beckham.

The affidavits signed by Beckham were not false. Beckham went through the affidavits line by line at trial, after he had been cross-examined on their contents. (Tr., pp. 97-102). (The affidavits are found at Tr., pp. 350, 353, 356, 359, 363, 366, 407, 410, 417 and 420). All the affidavits were the same except for some material added at the bottom. (Tr., p. 92). The only item out of eleven affidavits (Tr., p. 92) that Appellant could offer as allegedly false appeared in the affidavits accompanying the two arrest warrants for Bobby Gore. (Tr., pp. 94-95)

Those affidavits stated that Bobby Gore had been seen entering the Ship's Wheel Seafood House on January 21, 1981. Beckham did in fact have information that Bobby Gore entered the restaurant that morning. The information had come from another officer, to whom Gore had admitted being at the restaurant. (Tr., p. 95). Beckham gave the correct information to the magistrate, who apparently misunderstood and typed that Gore had been seen entering the restaurant. (Tr., pp. 37, 94).

In furtherance of the attempt to uncover the traitors in the department, Foreman and Beckham prepared dummy incident and case reports as a lure to smoke the traitors out into the open. (Tr., pp. 38-39). By leaving a false impression of the strength of the case,

Foreman felt the arrested criminals might reveal who their inside sources were or the corrupt officers might give themselves away. (Tr., p. 39). The dummy or loaded reports backfired, however, because Beckham and Foreman learned their lives were in danger. (Tr., pp. 41-42).

During the weeks that followed the arrests, Beckham urged Foreman to bring the matter to the attention of Captain Buddy Fowler. (Tr., pp. 41, 80-81, 95). Foreman, however, wanted to wait until he could have a thorough discussion with Chief Gordon Harris, who, except for an occasional weekend, had been at F.B.I. school in Virginia during the time covering all the events so far related. (Tr.m, pp. 95, 144, 154-155). Beckham, still believing Foreman knew what he was doing, acquiesced to wait.

(Tr., pp. 41, 80-81).

The preliminary hearing arrived, however, before Chief Harris returned. At the preliminary hearing on February 26, 1981, Foreman took the stand and testified falsely. (Tr., p. 44). Up to the last moment, Beckham did not believe that Foreman would actually lie on the witness stand. (Tr., p. 41). Beckham told Foreman he (Beckham) would not lie. Solicitor Dunn asked Beckham to take the stand and corroborate Foreman's story. (Tr., p. 44). This Beckham refused to do, indicating he could not testify to anything. (Tr., pp. 44-45). Beckham did not testify at the preliminary hearing.

Following the preliminary hearing, Beckham sought out Captain Fowler and disclosed to him the distressing news of Foreman's false testimony. (Tr., p. 47). The two of

them spoke to Solicitor Dunn (Tr., p. 47).

An internal investigation followed on February 28. Under questioning, Beckham represented that the whole case and investigation had been supported by falsehoods. (Tr., p. 48). When asked whether the affidavits themselves were false, he stated they were. (Tr., p. 48). Beckham and Foreman were fired from the Horry County Police Department that same day. (Tr., p. 49). That evening, the firings were announced at a press conference where a handout was distributed. (Tr., pp. 90, 145). The handout stated Foreman had testified falsely at the preliminary hearing. The handout did not state Beckham had testified at the hearing, much less that he testified falsely. (Tr., p. 309).

In pertinent part, the handout

stated:

> This action arose out of a drug case wherein it was determined that Detective Foreman testified falsely at a preliminary hearing that was held on February 26, 1981, and Detective Beckham was an active participant in furnishing false information to this department.

(Tr., p. 309).

Appellant's reporter Bob Bloodworth, who wrote the stores, was present at the press conference. He spoke with both Solicitor Dunn and Chief Harris for about fifteen minutes each after the press conference was over. (Tr.m pp. 189-190). Neither Dunn nor Harris told him Beckham had testified at the preliminary hearing. (Tr., pp. 120, 148). Bloodworth did not claim to have the false information from any other

source. (Tr., pp. 191-192).

Neither Dunn nor Harris told Bloodworth that Beckham testified at the preliminary hearing. Yet that falsehood appeared in Bloodworth's first story, which was published on March 1. (Tr., p. 306).

Appellant newspaper reported that Beckham had given false testimony at the preliminary hearing. The newspaper repeated that falsehood two days later. (Tr., p. 307). After that first story appeared, Beckham immediately called the newspaper and tried to talk to someone about the false news article. (Tr., p. 52). He stated he had not testified at the preliminary hearing. (Tr., p. 52). He was told to call back the next day, March 2. (Tr., p. 52). The next day he called and asked for the editor. (Tr., p. 52). The individual answering the

phone said the editor was unavailable. (Tr., p. 52). Beckham again informed Appellant there was a serious falsity in the article. (Tr., p. 52).

About an hour later, someone called Beckham from the newspaper. (Tr., p. 53). Beckham again, now for the third time, stated the article was wrong and the caller stated the newspaper would check it out with Solicitor Dunn. (Tr., p. 53). The next day, March 3, another front-page article was published by Appellant falsely stating Beckham had given untrue testimony at the preliminary hearing. (Tr., p. 53).

Even though a correction finally appeared stating Beckham did not testify at the preliminary hearing, as had been reported earlier, (Tr., p. 308), and even though Beckham was totally acquitted in a criminal trial, including charges of

false swearing, the community at large thought he had taken the witness stand at the preliminary hearing and given false testimony. (Tr., p. 168).